

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PATRICIA L. LEON,

No. C-09-4695 TEH (PR)

Petitioner,

ORDER DENYING APPLICATION FOR
LEAVE TO PROCEED IN FORMA
PAUPERIS AND DISMISSING
PETITION

v

PAUL COPENHAVER, Warden, et al,

Respondent(s). (Doc. #2)

_____ /

Petitioner, a federal prisoner currently incarcerated at the Federal Corrections Institution ("FCI"), Dublin, and proceeding pro se, has filed the instant Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 challenging the execution of her federal prison sentence. Doc. #1. Petitioner is in the custody of the Bureau of Prisons ("BOP") serving a sixty month sentence after she pled guilty in April 2008 to possession with intent to distribute over 100 grams of heroin; her projected release date is September 17, 2012. Id. at 2. Petitioner also seeks leave to proceed in forma pauperis. Doc. #2.

As explained below, the Petition is subject to dismissal

1 for failure to exhaust administrative remedies.

3 I

4 Although § 2241 does not specify that petitioners must
5 exhaust available remedies before filing petitions for a writ of
6 habeas corpus, the Ninth Circuit "require[s], as a prudential
7 matter, that habeas petitioners exhaust available judicial and
8 administrative remedies before seeking relief under § 2241." Laing
9 v. Ashcroft, 370 F.3d 994, 997 (9th. Cir 2004).

10 The BOP has established procedures by which prisoners can
11 seek review of "an issue relating to any aspect" of their
12 confinement, thereby satisfying the administrative exhaustion
13 requirement. 28 C.F.R. § 542.10. The procedures apply to all
14 prisoners in programs operated by the BOP. Id. The first level of
15 review is "Informal Resolution" at the institutional level. Id. §
16 542.13. A prisoner who is not satisfied with the Warden's response
17 resulting from the Informal Resolution process may then submit an
18 appeal to the Regional Director. Id. § 542.15. A prisoner who is
19 not satisfied with the Regional Director's response may submit an
20 appeal to the General Counsel of the BOP. Id. Once the General
21 Counsel responds to and signs the appeal, the prisoner has exhausted
22 administrative remedies. See id. § 542.11.

23 Here, Petitioner states that she was "*in the process of*
24 *exhausting her administrative remedy* through the BOP's
25 administrative appeals process" when she filed the instant Petition,
26 thereby conceding she did not exhaust her administrative remedies

1 prior to filing it. Doc. #1 at 3, emphasis added. Petitioner
2 nonetheless urges the Court to waive the exhaustion requirement and
3 consider the merits of her Petition.

4
5 II

6 Because it is not a jurisdictional prerequisite, the
7 exhaustion requirement may be waived in limited circumstances. See
8 Laing, 370 F.3d at 998 & 1000-01 (listing circumstances under which
9 waiver of exhaustion requirement may be appropriate, which include
10 "when: (1) available remedies provide no genuine opportunity for
11 adequate relief; (2) irreparable injury may occur without immediate
12 judicial relief; (3) administrative appeal would be futile; and (4)
13 in certain instances a [petitioner] has raised a substantial
14 constitutional question").

15 Here, Petitioner claims exhaustion would be futile
16 "because the BOP issues a form letter of denial stating that the
17 individual has been considered and denied based upon their
18 individual RRC needs, while being told by [s]taff that they are
19 being categorically denied." Doc. #1 at 3. Petitioner admits that
20 "[r]esponses for those who have pursued administrative remedy
21 reflect that they were considered on an individual basis" but
22 claims, without offering any explanation why, "[t]hat is not the
23 case." Id. at 8. Petitioner adds that because the "Deputy
24 Director" is married to the warden, "[i]t is worst case Nepotism,
25 where the Deputy Director is responsible for reviewing her husband's
26 decisions, [such that] inmates cannot expect objective review of
27
28

1 their administrative remedy." Id at 3. Completely lacking any
2 evidentiary support, Petitioner's conclusory allegations that
3 exhaustion would be futile are unpersuasive and insufficient to
4 excuse her failure to exhaust administrative remedies.

6 III

7 For the foregoing reasons, the Court finds Petitioner has
8 not exhausted her administrative remedies and that she is not
9 entitled to waiver of the exhaustion requirement. Accordingly, the
10 Petition for a Writ of Habeas Corpus under § 2241 is hereby
11 DISMISSED without prejudice to Petitioner's filing a new habeas
12 corpus action after exhausting the BOP's administrative appeals
13 process.

14 Additionally, Petitioner's request for leave to proceed in
15 forma pauperis (Doc. #2) is DENIED. Documents on file with the
16 Court show Petitioner's average monthly deposits for the past six
17 months was \$1083.32 and her average monthly balance for the same
18 period was \$17.64. The \$5.00 filing fee is now due.

19 The Clerk is directed to terminate any pending motions as
20 moot and close the file.

21
22 IT IS SO ORDERED.

23
24 DATED 11/02/09



25 THELTON E. HENDERSON
26 United States District Judge